

FORM SUMMARY

Name of Form: Order on Prisoner's Petition for Waiver of Fees/Costs Based on Imminent Danger

Form Number: CV-441

Statutory Reference: §814.29, Wisconsin Statutes

Benchbook Reference: CV 46-4

Purpose of Form: Order by the judge on whether the petitioner has met the requirements to proceed without prepayment of filing and service fees/costs when the prisoner is alleging imminent danger of serious physical harm.

Who Completes It: Judge

Distribution of Form: Original to clerk of court, copy to prisoner, copy to Department of Corrections and Department of Justice.

Accompanying Forms: If the affidavit of indigency is granted, the clerk of court will authenticate the copies for service on the defendants/respondents and send them back to the prisoner. If denied, the clerk of court will not authenticate the copies for service but will return them to the prisoner. The prisoner can then decide if he/she wishes to pay the fees and costs with his/her own money.

Regardless of whether the petition is granted or denied, a copy of the order should be sent to the Department of Justice and Department of Corrections. The other copy of the affidavit of indigency and accompanying documentation should be sent to the Department of Justice with its copy of the order.

New Form/Modification: Modification, last update 05/01.

Modifications: Added word "prepayment" to title, which now reads "Order on Prisoner's Petition for Waiver of Prepayment of Fee/Costs Based on Imminent Danger".

Comments: The new prison litigation law (1997 Wisconsin Act 133) became effective September 1, 1998. This law creates significantly different procedural requirements for a prisoner seeking to commence an action or special proceeding without prepayment of filing fees, costs, or security for costs. Because of the different decisions that must be made by the court, this specialized form must be used in lieu of:

- CV-410, the general Petition for Waiver of Fees/Costs--Affidavit of Indigency and Order, and,
- CV-439, the Order on Prisoner's Petition for Waiver of Fees/Costs.

This form is to be used when the prisoner is making a claim that he/she is in imminent danger of serious physical harm. (CV-439 is used when there is no claim of imminent danger of serious physical harm). A prisoner making a claim of imminent danger of serious physical harm is not required to comply with the requirements to provide a certified copy of her/his trust fund account statement and is exempt from the "three dismissals" prohibition.

Two major aspects of the new law should be noted:

- First, there is no "automatic eligibility" for indigency status. The prisoner must complete the financial information.
- Second, any waiver of filing fees or service costs is only temporary. Prisoners will ultimately be required to pay the filing fees and costs. The court's order directs the Department of Corrections to take certain action with respect to the prisoner's trust fund account in order to pay the filing fees and costs in installments.

In order to guide the judge in making the indigency determination, the form has been drafted to follow the steps the judge must consider in the order in which they must be considered. After reviewing the documentation that the prisoner has attached for completeness (see above Document Review Determination), the judge proceeds to the following:

Exhaustion of administrative remedies portion:

- The court must determine whether or not the prisoner has exhausted his or her administrative remedies. If the prisoner has done so, box 3 should be checked and the court should go on to "imminent danger determination."
- If the prisoner has not fully exhausted all available administrative remedies, box 4 should be checked denying the petition to proceed without prepayment of filing fees and costs. The court is not required to go on to any of the other issues and should return the materials to the prisoner.

Imminent Danger Determination:

The court must make a determination whether the prisoner has made a *prima facie* showing that he/she is in **imminent danger** of **serious physical harm**.

- If the court is satisfied that the prisoner has made the required *prima facie* showing of imminent danger of serious physical harm, box 5 should be checked. The court should go on to the "economic status determination."
- If the court is not satisfied that the prisoner has made the required *prima facie* showing of imminent danger of serious physical harm, box 6 is to be checked. The court is not required to go on to the "economic status determination" and should return the materials to the prisoner.

Economic status determination:

- If the court reaches the economic status determination, the court should then review the prisoner's affidavit of financial information and make a determination of eligibility. A judge has two choices: granting the petition or denying the petition. The statutory language does not give the court the option of a "conditional granting of the petition" (as is found when the prisoner is seeking the ability to file without prepayment and not making a claim of imminent danger). RMC has no explanation for this distinction.

It should be noted that granting the petition will still require the prisoner to ultimately pay the filing fee and costs. The legislation is intended to end the "free ride" for prisoners in litigation.

- **Granting the petition.** If the court grants the petition,
 - The prisoner can proceed without prepayment of fees and costs.
 - A copy of the form must go to the agency having custody of the prisoner's trust fund account to freeze that account. If the prisoner is being housed out of state, the notice goes to the Dodge Correctional Institution at Waupun.
 - Each time the prisoner's trust fund account reaches \$10.00 the agency must send that \$10.00 to the clerk of court until the total fees and costs are paid.
 - The clerk of court must send notice to the agency of the total amount of fees and costs as soon as that information is known (after service fees are known) on CV-443.

- **Denying the petition.** If the court denies the petition because the prisoner is not indigent, the prisoner must prepay all filing fees and costs.

It should be noted that this form does not give the court the option of denying the affidavit of indigency on the grounds that the action is frivolous, as is found on the general Affidavit of Indigency/Order in CV-410. ***This is NOT an oversight.*** If a judge believes an action may be frivolous, the judge is to make that decision ***after*** the judge has granted the indigency status and allowed the action to be filed.

The prisoner litigation law specifically provides that the court is to "review the initial pleading as soon as practicable *after* the action or special proceeding is filed with the court" §802.05(3)(a), Wisconsin Statutes, (emphasis added). Thus, the pleading is to be reviewed after the court has granted the affidavit of indigency and allowed the matter to be filed. This may create what some might consider a curious situation: the court, reviewing the documentation, finds the prisoner to have met the basic requirements for filing without prepayment and authorizes the filing by signing this form (CV-441). The court then dismisses the action by signing form CV-444. However, this is not so curious if one understands two points intended by the legislature:

- The dismissal after filing constitutes a dismissal under the "three dismissals" standard (if it were dismissed prior to filing, it would not count as one of the proscribed "dismissals"), and,
- The prisoner will be required to pay the full filing fee from her/his trust account over time. If the dismissal had occurred before filing, there would be no filing fee.

Upon dismissal, materials do not need to be returned to the prisoner. However, the Clerk may return the materials if desired..

About this form:

This form is the product of the Wisconsin Records Management Committee, a committee of the Director of State Court's Office and a mandate of the Wisconsin Judicial Conference.

If you have additional information that does not change the meaning of the form, attach it on a separate page. The form itself shall not be altered.